

May 27, 2009

Dan Gaffney
WGMD
PO Box 530
Rehoboth Beach, DE 19971

**RE: Freedom of Information Act Complaint
Against Sussex County**

Dear Mr. Gaffney:

On April 3, 2009, the Delaware Department of Justice (“DDOJ”) received your complaint that Sussex County (“the County”) violated the Freedom of Information Act (“FOIA”) in responding to your FOIA request to review certain email and text messages. On April 9, 2009, the DDOJ forwarded your letter to the County. We received their response on May 1, 2009. We requested additional information from the County, and received their timely response on May 11, 2009. This is the DDOJ’s determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

On April 1, 2009, you asked to review the emails and text messages that Mr. Daniel Kramer solicited under FOIA in his January 23, 2009 request to Sussex County: specifically, all email and text messages, dated between August 15, 2008 and January 22, 2009, sent and received among and between the Council President, the Sussex County

Administrator, the Sussex County Assistant Administrator and six current or former Council representatives. In a series of emails and telephone conversations, the County advised you that it required payment of \$227.12 for the cost of obtaining the emails from its computer system. You complain that the County is “overcharging” you to review public information, and that it is withholding public information because it has stated that it will not give you emails that, as you describe them, “relate to personnel, unresolved lawsuits, or ongoing property acquisition negotiations.”

In response to your complaint, the County explained that it “does not have the ability to access text messages that may have been sent from a cell phone unless they were received as an email through a county email account. . . . In order to access e-mails . . . it was necessary for the County to manually go into each person’s e-mail account and insert search criteria to retrieve all messages ‘to’ each person and ‘from’ each person occurring between August 15, 2008 and January 22, 2009.” Each email is then printed and scanned, and the resulting PDF file is reviewed to determine if any emails are not “public records.” The County estimates 1,180 pages of paper records would be generated by your FOIA request. At the \$0.30 per page rate for copying that is authorized by the County’s Public Record Access Regulations, the cost of providing paper copies would be \$354. As an alternative, the County offered to provide a CD of the records and charge \$227.12, representing eight hours of work at the hourly charge of \$28.39 for a County employee to retrieve the emails. The County notes that employee is the lowest paid of the three employees who are qualified and authorized to perform such work.

RELEVANT STATUTES

29 *Del. C.* § 10003(a) provides that, “[a]ll public records shall be open to inspection and copying . . . during regular business hours . . . [that r]easonable access to and reasonable facilities for copying these records shall not be denied . . . [and that a]ny reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy.” “If the record is . . . in storage and, therefore, not available at the time a citizen requests access, the custodian shall so inform the citizen and make an appointment for said citizen to examine such records as expediently as they may be made available.” *Id.* “Public record” is defined in 29 *Del. C.* § 10002(g), and there are 17 subsections to section 10002(g) that describe records that “shall not be deemed public.” These exemptions include personnel files, 29 *Del. C.* § 10002(g)(1), pending litigation, 29 *Del. C.* § 10002(g)(9), and records of executive sessions, 29 *Del. C.* § 10002(g)(10) (which includes preliminary discussions on site acquisitions, 29 *Del. C.* § 10004(b)(2)).

DISCUSSION

The definition of a public record in 29 *Del. C.* § 10002(g) does not depend on the “physical form or characteristic by which such information is stored, recorded or reproduced,” and the County properly treats electronically stored information as subject to FOIA. The County is also correct that, as with paper records, electronically stored information only needs to be made publically available if it meets the general definition of public record in 29 *Del. C.* § 10002(g) and is not subject to an exclusion described in 29 *Del. C.* § 10002(g)(1)-(17). The County is, therefore, entitled to review each email that is responsive to your request to determine, first, if it meets the general definition of a

public record and, second, if it contains information that is exempt from public disclosure under one of the 17 statutory exclusions.

As to the charge of \$227 for retrieving the emails, we have previously determined that a public body that has a written policy may make reasonable charges for labor and processing time for retrieving and copying electronic data. *Del. Op. Att’y Gen.* 07-IB19, (), 2007 WL 4732802 (Del. A.G. Aug. 28, 2007). Sussex County has such a policy, found in its Public Record Access Regulations, which provides in paragraph 7(b) that “Fees for the copying of . . . any . . . public record not subject to routine photocopying shall be the actual cost of reproduction. . . . Fees may also include appropriate hourly rates plus actual overhead for County employee time in obtaining and reproducing public records, beyond routine photocopying.” The charge of \$28.39 an hour for the actual cost of obtaining and reproducing the records is reasonable because it represents the most cost-effective way for the County to respond to the FOIA request.

However, the charge for retrieving the emails cannot be imposed on more than one person requesting the emails, unless the actual search and retrieval must be repeated. In this case, the County has indicated that it will charge \$227 to both you and Mr. Kramer. As the County has obtained the records only once, it has no basis to charge you the full amount.

CONCLUSION

It does not violate FOIA for Sussex County to review the requested emails before making them public, to determine if each email meets the statutory definition of a public record. Moreover, it does not violate FOIA for the County to levy a reasonable charge for the actual cost associated with an employee obtaining electronic records, or to refuse

to provide such records until the requesting party pays such costs. However, the County has indicated that if more than one person requests identical records, each requestor will have to pay for the initial cost of retrieval. Unless the County actually incurs duplicate costs, it cannot charge each requestor for the initial retrieval; only the “actual costs of obtaining and reproducing the records” may be charged.

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis, State Solicitor

cc: Sarah Murray, Opinion Coordinator
James D. Griffin, Esquire